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DEFINITION OF LAW.[1]

I.

A scientific school of legal thought[2] should begin, if possible, with a sound, working definition of the term law. The current English and American definition, given a hundred and forty years ago by Blackstone, runs thus: "Law is a rule of civil conduct prescribed by the supreme power in a State, commanding what is right and forbidding what is wrong." That this is unsatisfactory has often been declared, but the definition is still accepted in law schools and in text books around the world, and we cannot ignore it. That it is dangerous as well as unsound is worth pointing out at some length.

The chief objection is, that the definition as a whole naturally suggests, and in connection with Blackstone's context and the practice of the time fairly teaches, that the sovereign of a people may be external. Its language indeed suggests a theocratic original; the definition, especially in connection with the discussion accompanying it, reads like an attempt to generalize the decalogue, with the substitution of the words "prescribed by the supreme power in a State" for "And God spake all these words;" the analogy being plain, that the supreme power in a State may be external to the people, as God is external to His people. And now observe the actual language of the context. "The general signification of law," the author of the Commentaries says, "is that of a 'rule of action' dictated by some

[1] The author reserves the right of reprinting.

[2] See an article on this subject in the Green Bag for this month.

superior being." It is true Blackstone says this in his preliminary discussion concerning law in general, before he has reached the subject of municipal law; but he finds the very type of all law in the words just quoted. The only difference he makes—and this is the very next sentence—between the "general signification of law" and law "in the more confined sense," is that law in this latter sense consists of rules of *human* action or conduct.[1] There is no suggestion of any difference in regard to the sovereign, on the point of externality. Indeed a little further on, where Blackstone is considering the "law of nature," he speaks in the same terms of all law. In a state of nature "there would be no occasion for any other laws than the law of nature and the law of God. Neither could any other law possibly exist; for a law always supposes some superior who is to make it." Blackstone's law was an echo of theology—theology, too, of the eighteenth century.

It is true that in the course of his remarks Blackstone finds occasion to quote Justinian's precept, "Jus civile est quod quisque sibi populus constituit;" but he is making the quotation, not to show that the sovereign must not be external, but to justify his own use of the term "municipal or civil law," as the law governing "districts, communities or nations." The whole preliminary discussion is based on the proposition that human laws all depend upon the divine; and the conclusion is plain, in the absence, in a discussion of distinctions, of any suggestion to the contrary, that as the Author of the divine laws is external to those upon whom such laws are to operate, so the supreme power in a State, from which proceed the laws which are to operate in civil affairs, is external to the people. It is a fact to be noticed that the rule of conduct is prescribed by supreme power, not in *the* State, but "in *a* State;" any State satisfies the definition. Plainly, if Blackstone's definition was to make any distinction at all, the point that there could be no external sovereign in his conception of law was important enough to require him to make it clear beyond a doubt.

What the face of the definition and the context tell us, the practice of the time so fully exemplifies that one cannot be permitted to doubt that the definition was to be

[1] The term municipal law is used in the same sense in this paper.

taken as consistent with the practice, or, more likely, as based upon it. Blackstone of course knew what was going on, at the very time of his definition, between Great Britain and her American colonies; could there have been a better time to repudiate external sovereignty? Blackstone gave no sign—his definition was given, it remained unchanged. The Commentaries were already famous at the time of the American revolution; at home they were held an authority as the work of one who had been appointed a Justice of the Common Pleas in the year 1770, just after the Commentaries were completed. The dispute with America was a plain one. Parliament claimed the right to make laws for the colonies "in all cases whatsoever;" America held that Parliament was an external power touching matters of domestic concern in this country, and severed her connection with the mother State.

The idea and the practice prevailed throughout Europe; everywhere on that side of the Atlantic the conception of law, in conformity with theology, included external sovereignty. The "social contract" itself had been taken, even in England, to support absolute monarchy. Hobbes had held that, in virtue of that contract, interpreted by his idea of the State as the end and aim of all things social, the people had contracted away their rights in favor of the king. All this was object-lesson for Blackstone, and Blackstone was faithful to it. His definition can have but one meaning; it could be accepted by the autocrat of all the Russias.

A remark is proper here. The reason why a sovereign who is external is such, is not because his home is beyond the sea; it is because he has no authority. "Lynch law," or the "law" of a vigilance committee, proceeds from an external sovereign. The moment your external sovereign receives rightful authority, that moment he ceases to be external. The supreme power of the State is not, under English or American law, an external sovereign, if that power is justly exercised over a people.[1] It certainly

[1] The question between American "imperialists" and "anti-imperialists" so called, is simply what constitutes authority beyond the sea. Authority conceded, *cadit quæstio.* This paper deals only with accepted doctrine. Assuming authority, all agree that the sovereign is not external; on that accepted doctrine the subject of a correct definition of law here proceeds.

is not external in any objectionable sense as it ordinarily exists in a State. Supreme power is but a necessary phase of organized society, of which every member is a part. In the nature of things the State is only (for the present purpose) what the word etymologically declares, a standing—a standing or holding together of the people; and that imports supreme power. It is external in reference only to individuals, as power always must be. Blackstone's definition would permit the power to be external to the whole body of citizens, whereas supreme power should be one with them, and nothing more.

It must further be particularly observed that the objection to the external sovereign is, not that he cannot lay down law—whatever the courts will enforce is law, because it binds—the objection is that his control is dangerous, that the law he lays down is a bad kind of law, likely to result in disorder and revolt.

The definition is also unsound, in detail. "Law is a rule of civil conduct." This statement, taken as a whole, is indefinite where one is entitled to call for definite information. One may well expect the definition to tell us on what ground the rule of civil conduct is based, but no hint is given. The word "rule," too, well enough if understood as probably it was intended, needs explanation beyond any it receives. Besides meaning regulation, rule naturally suggests requirement; and the words "commanding what is right and prohibiting what is wrong" show that that is the intended meaning. Now much of the law, taken in a straightforward way of stating it—in the only language, it may be, in which it is expressed, especially in the case of a statute—may not be requirement at all. So taken it may simply be a grant of authority for acquiring rights which before had no existence except in the State. The legislature passes a statute authorizing a town to borrow money, to vote on giving bonds for a certain purpose, to become incorporated, authorizing the formation of trading corporations, or the doing any of a score of things, where no right whatever existed before. The word rule, in the sense of requirement, is inapplicable to such law, taken only as it is stated, that is in its own direct terms. A distinction should

have been made, if not for the expert at least for the inexpert; and Blackstone was writing for the latter. He ought, it may fairly be urged, to have told those whom he was teaching that, in regard to laws granting authority, the word rule was applicable only in a collateral way, to the course, to wit, to be pursued in regard to the authority—that in its proper sense of requirement, it meant nothing more than that the authority is usually subject to conditions to be complied with, and that as an incident third persons must respect it.

One may not unreasonably object, in the next place, to the word "prescribed"—"a rule of civil conduct prescribed by the supreme power." By making that word part of his definition, Blackstone makes it necessary to the same; if there could be any doubt, the fact is made clear by what follows. Blackstone says that, in using this term, he means that the rule must be "notified." "A bare resolution," he declares, will not be enough. "It is *requisite* that this resolution be notified to the people who are to obey it."

Is it necessary to the existence of a law that it be "notified to the people"? If it is, then the American colonies had very little law. At that time legislation was printed but fitfully, and then only in part; and the decisions of the courts were never published at all, or published only of some case calculated to create public excitement, an unusual thing. Are the people of our territories, where the law, at any rate the judicial law, is seldom published—are they without law? And what is to be said of the people of our smaller States, like Rhode Island and Delaware, where the decisions are published only at intervals of several years—only when the accumulation is enough to make a respectable volume? Are these decisions meantime of no general force? Even in the large and populous States, where statutes and decisions are published at very short intervals, there is much law that is not "prescribed."

What statute or decision ever prescribed that no one may take another's property without permission? The fact that there is a law covering the case is indeed plain; but that is not because it has been prescribed in any law book or other publication. To prescribe indeed means more

than to give requisite notice; even of that meaning it is barely patient. More properly it signifies to set down in direct terms, with fixed bounds. To leave a matter to inference is not to prescribe it. And then if it be said, as Blackstone seems to say, that much of the law not prescribed in law books is divine law, "prescribed in revelation," it must be replied that even in regard to that part, the law has not been "prescribed by the supreme power in a State;" though it must be admitted that where the sovereign is external to the people the rule must be prescribed, for it is not that people's own "rule of conduct."

But in a larger and more important sense the word creates a false impression of the making of what is known as common law. Common law is not laid down with fixed bounds; it is peculiarly a reflection of times and conditions of society, a little tardy, but following on and changing more or less accordingly. The times may, it is true, be a long dead level, untouched by serious social change; they may be as they were in Blackstone's day and for generations before. On the other hand they may be as they were in the first half of the 19th century; they may be as they have been since our Civil War; they may be as they are to-day, fairly revolutionary. Whatever the condition of society, the common law will seldom have sharply drawn lines. Even its most definite rules are almost certain to have a penumbra—a penumbra which may spread back towards the rule itself until the whole field becomes indistinct; to be lighted up again perhaps by a new rule, with a new penumbra, subject to the same process. Examples come ready to hand even from comparatively stagnant times. There is Chancellor Kent's famous rule in Bay *v.* Coddington,[1] in regard to value. The penumbra, not noticed perhaps at first, was there; and how steadily it spread backwards! The rule itself was gradually becoming indistinct; to find it required an expert, until at last it was to be set aside altogether for doctrine which Chancellor Kent had utterly repudiated. The last touch was indeed given by statute; but many a case of the kind has been finished by the courts. There is Chief Justice Shaw's fellow-servant rule.[2] The penumbra was present; and now, what

[1] (1821) 5 Johns. Ch. 54.

[2] Farwell *v.* Boston and W. Corp. (Mass. 1842) 4 Met. 49.

with statute and judge-made law, in the social changes which have taken place, the whole sky is darkened. There was again the older rule that false representation, even scienter, could not be a defence to contract. That seemed to be as hard and fast a rule as could be laid down; but even that rule, or perhaps I ought to say, that rule especially, had its penumbra, a veil spreading over from equity; and then finally common law judges replaced the rule with a better, the one they had refused to admit. Conversely, even the age-long darkness of savage rules in the criminal law has a lighter edge; the light trochee trips to the sombre spondee; there is mocking of Tyburn[1] in wager of battle,[2] and the sky begins to clear.

Blackstone's word "prescribed," taken as words of definition should be taken, in its natural sense, would deny this common quality of judicial law. A definition of law need not declare that laws have a borderland in chiaroscuro, but definition should not contradict the fact. You may define the sun without saying that that fiery planet is apt to make it hot for men in midsummer, but you must not use a word which would seem to say that it cools the air.

Finally, to speak of law as consisting of rules prescribed by supreme power is to convey a wholly erroneous idea. The chief rules of the law are not "prescribed" in any sense; they *exist*, as will be seen later, as part of the very existence of the State itself.

"Commanding" and "prohibiting" are words out of place. There are few such words in our law: the most that can be said is that constitutions and statutes make use of them more or less; judicial law seldom if ever does. Certain legal precepts, such as mandamus and injunction, run indeed in words of command or prohibition; but a precept or a writ is not a law—it is only a direction made according to law. The law is general, the precept particular. Even if such instruments were laws, the fact would not justify the use of the words in question, for precepts of the kind are applicable to but few cases; they would make only a small part of the law. So in general of the decisions of the courts; taken singly, these are not properly speak-

[1] Tyburn gallows.

[2] The last case was Ashford *v.* Thornton (1818) 1 Barn. & Ad. 405.

ing law, they are merely according to law. They are particular, applicable to A and B, parties to a suit, while the law is general. The law may of course be seen in a decision; it may be stated in terms in it; but the decision, whatever its form, whether of command, prohibition or anything else, simply falls within the law.

If it be said that the criticism is only one of words,—that the law must be obeyed or unpleasant things may follow, and that therefore, in effect, the law does command and prohibit, the answer in the first place is, that for beginners the words are misleading, and in the second place that the statement at best is true only of portions of the law. In the case of laws conferring authority, as we have already seen, it is only in the course to be pursued in regard to the exercise of the authority that any command or prohibition can be said to be made. Surely the authority itself is given by law, though where it is confined to particular persons others may be said in some remote sense to be prohibited from interfering. The point is, that the law says that the town or the railway or other body *may* do the thing authorized; enough for the criticism that the town or other person has an authority, without being "commanded" to do what otherwise would be unlawful.

More than all this, Blackstone's definition makes the word "command" suitable even to permission and so compels it to commit suicide; for he says that law "commands what is right," and according to his own explanation of the word, as will presently appear, whatever the sovereign declares is "right"—not morally but legally. A man is commanded to do what he may do or not, as he pleases Plainly, Blackstone overlooked one part of the law.

The words "right" and "wrong" required Blackstone himself to justify them. In their natural sense when taken together as in the definition, and in connection with the words "command" and "prohibit," they import things right or wrong in themselves, right or wrong in plain morals. But that is the very sense in which, as Blackstone explains, they are not to be taken. In that sense the words fall, not under municipal but under divine law; rights "which God and nature have established * * * need not the aid of human laws to be more effectively invested in every man

than they are." "So that, upon the whole," he goes on to say, "the declaratory part," by which he means the determining part, "of the municipal law has no force or operation at all with regard to actions that are naturally and intrinsically right or wrong."

And now, having emptied the words of their natural meaning, Blackstone finds himself compelled to empty them of all meaning, or at least of all value for the purpose of a definition; for he says that as the words are not to be understood as referring to what is intrinsically right or wrong, their meaning must be found in the declarations of the sovereign. Things are, within the purport of the definition, "right or wrong, just or unjust, duties or misdemeanors, according as the municipal legislator sees proper for promoting the welfare of society," etc. In other words, search out the innumerable decisions and precedents, add to them the multitude of statutes, make sure that you understand every one, and then you know the meaning of "right" and "wrong" as those words are used in the definition!

Blackstone's definition must be set aside.

II.

Is it possible in the interest of the Law School,[1] to find a trustworthy and useful definition of law, as law is now known in English speaking lands? After Blackstone will it be presumptuous to try? The examination of the famous definition may have helped the way. We have seen that certain things should be rejected, and we have seen some things which should replace what is to be rejected. This cannot be reckoned as anything short of gain. The facts may be recounted:

1. A definition of a safe system of law should not suggest that the sovereign may be external. 2. The expression "rule of civil conduct" is indefinite, and "rule" should be explained. 3. The word "prescribed" is unsatisfactory, whether in the sense that law must be "notified to the people," or that it is to be set down in fixed terms; it is

[1] It is not to be expected that the courts will adopt a definition of the term, nor is it desirable that they should.

enough, so far as any requirement of notice is concerned, that the law proceeds from the people; instead of being set down in fixed terms, it is a product of times and conditions, changing in light and shade accordingly; and further, instead of being prescribed, it is part of the very life of the State. 4. The definition should not declare that law consists in commands and prohibitions. 5. It should not tell us that law is predicated of right and wrong as shown in the declarations of the sovereign.

It is proper however to state, that definition of a comprehensive term like law need not exclude things not intended to be covered by it; enough that it does not suggest them as within it. Such a definition is to be taken as including only what it affirms or fairly implies, taken in connection with any remarks accompanying it and relevant external facts. It is still more important to observe that no definition of the term municipal law can be trustworthy and useful which puts the term in a straight-jacket of hard and fast lines and specific dimensions. It would be "perilous" indeed to put any such definition to use in the administration of justice. There are great indeterminate forces in relation to law, and it should be part of a trustworthy and useful definition of the term to find the place for the play of them and make allowance accordingly; and that too in some larger sense than the play of mere light and shade. A correct analysis of the typical phenomena of law—a grip on things as they are—should lead to the desired result.

The first thing to be said is, that one must be careful not to be misled by figures of speech. We constantly use the term law figuratively, and properly enough; but in the present inquiry we must be on our guard against taking figure for fact. We say that the law authorizes or does not authorize one to do so-and-so, as though the law had personality; what we mean is that it is lawful or unlawful to do the thing. We say that the law deals with a question in such-and-such a way; what we mean is that the courts deal with it in that way. We speak of setting the law in motion; what in reality we set in motion is the machinery of justice, the courts. We may speak of law as the "life" or "life-blood" of the State; the figure carries a certain true

idea. But while language of the kind is picturesque and inevitable with men of imagination, it must not be taken to imply that law is a distinct entity and cause of things. Law is only another word for the very things, it may be, which in figurative language it is put as creating. Law does not, for instance, create relations of right and duty, though language sometimes seems to say that it does; law does not even make the relations binding, in any sense of a force distinct from those relations. The relations are necessarily binding in any organized political society; and that, so far, is municipal law. Relations of right and duty —a subject to be dwelt upon later—find their binding energy in the very life of the State; such binding energy is part and parcel of that life—the most essential part of it, not a product but a part of it. So it is that these relations go to make municipal law. What then is meant by municipal law must be found, not by supposing that law is something standing apart, but by considering the elements which go to make it up.[1]

In the examination of Blackstones's definition we noticed two phases of law, in the first of which the law appears in the form of requirement, in the second, of grant of authority. Now requirement imports right and duty in corresponding relation; duty being the term evolved in recent times from the idea of requirement or Blackstone's "command" and "prohibition." A has a right of possession in land; B and all others are required to respect that right, that is they are under a duty to A to respect it; and so there exists a relation of right and duty between A and other persons. A, again, has a right of contract against B; B must perform his contract, that is, he is under a duty to A to respect A's right; and so there exists a relation of right and duty between the two. Or we may equally well say, as before, of both cases, that a corresponding relation exists between the right of A and the duty of B, or of B and all others.

This is the great field of law; it is evidently what was in Blackstone's mind in framing his definition; it is what usually is in the mind of a lawyer in our day when he thinks of law.

[1] In an organized State, right, duty and law are coeval and coexistent, if what is said in the text is true; but of the three right alone is a true final cause.

What then is law in the sense, first, of the foregoing remarks in regard to relations of right and duty? The elements of the subject are now clear; they are right, duty and a relation between the two. A clear understanding of these terms should bring us to the point which we have been so long aiming at, and furnish language of definition which shall present the theory on which the law is constructed.

What is meant by right in the sense in which the term is used in the law; that is, what is meant by legal right? Apart from "natural" fundamendal rights, such as the right to live, and rights in all their elements strictly defined and not in dispute,—and this puts aside a large body of rights—the answer to the question is, whatever the judge, in his final word concerning a cause before him, decides. As a matter of fact most cases in the higher, especially in the highest, courts are cases in which the judges must decide the question of right. Social changes alone make this inevitable; no man can know the legal effect until the court of last resort makes answer. Such indeed is the complexity of human affairs that even natural rights and rights strictly defined may be drawn in issue so as to raise a question which must wait upon the decision of the judge in regard to the law of it.

But it is important to know what governs the decision of the judge. He is not permitted to decide a case arbitrarily; what then does in fact and legal theory influence and determine his decision in regard to the particular right? What indeed is the sum total of influences determining his decision? For some of these influences, it is clear, may be quite personal, or sub-legal, such as the judge's own views of political economy, politics, ethics, or whatever else of the kind the case may suggest. Allowance must always be made accordingly. Bearing this fact in mind, the answer to the question what determines, or is assumed to determine, the judge in deciding the point of right is found in a general conception, which may be put thus:—

Right, as the term is understood in municipal law, that is as the courts profess and appear to take it in the decision of causes, is based on the idea that men should be free to live and carry out their reasonable purposes in any reasonable way they will, or shortly, on the idea of freedom to do

whatever is reasonable. This in reality is nothing but the widest and most fundamental expression of an actual right, a right which every one has. It includes therefore those "natural, fundamental rights" and "rights strictly defined," above mentioned, which judges do not pass upon in the way of determining what constitutes the right. On the idea of freedom to do whatever is reasonable rests, in theory, the whole law of rights, natural, judicial and legislative.

All particular rights are founded upon this general conception, as well those in which a man has by his own volition limited his freedom, for instance by contract, as those in which he has not done so, as in the case of a man's rights against all the world. It matters not then, for the purpose of this inquiry, that particular relations may limit freedom; enough still that the general idea on which right is based embraces the particular one in which one's freedom may be cut down.

The State as well as individuals and bodies of men of course has rights, and in the same sense as in the case of individuals. On the part of the State, right, in the broad sense, is based upon the freedom of the State to live and carry out reasonable purposes in any reasonable way, whether by legislating for the welfare of the people, as in granting authorities, by entering into contracts, or generally by acting or abstaining, having regard of course to the rights of those who may be affected. And within the same general conception of right, the State, like an individual, may limit its own freedom of action by contract or in other ways.

Legal right accordingly enters into the definition of both laws of requirement and laws granting authority; legal right is freedom to do whatever is reasonable, under either of these heads.

Acting upon a right is in most cases a matter of freedom; to say that an individual, a corporation or the State, has a right to do anything reasonable is, by plain implication, to say that the individual, corporation or State may abstain from acting upon the right. It is enough therefore to speak of rights to act; the rest is implied. There may be exceptions; for instance, of the right to live what shall be said? One may venture one's life—may lay it down for country; "peradventure a man may lay down his life for

his friend." In America a man may *take* his own life; but may he make an attempt upon it and fail? The answer is not everywhere the same—the right might well be denied. It is at least doubtful in most of our States whether the right to live may be abandoned at will by attempting self-destruction. There is perhaps something more than an abandonment of a right in such a case; and so of other exceptions.

Again, in the idea of right as founded on freedom of action in the purposes of life, there is found place, in a definition of law of which that conception forms a part, for the play of light and shade already spoken of as a general manifestation of law; or rather, a definition of law founded upon that idea inevitably imports the play of light and shade throughout the subject, in all its modes of adaptation to life.

What is meant by "reasonable purposes," "reasonable ways," and the "welfare of the State," must, as the words themselves fairly imply, be left open—probably the meaning will always remain open—and, so far, the meaning of right, and hence of law, must be left indeterminate. And indeed rightly, for here is the great place for the "play of forces" before alluded to. At the same time it is conceived that some gain has been made in pointing out the basis on which the law in actual operation appears to rest; that should indicate, as has already been intimated, on what its lines of extension should be expected to fall. But it should be clearly understood that what the courts finally decide must be accepted as "reasonable" or as required by the "welfare of the State," as the case may be; any other view would make the law a speculative matter, a thing in the air, rather than an actual influence in the affairs of men. The law on which the decision is based may be unsatisfactory, but men cannot safely disregard it. If it is unsatisfactory, the legislature may correct it. And the same is to be said of legislation; an act of the legislature cannot be treated as unreasonable except for the purpose of repealing or amending it. Such is the course of things in actual life, and that is what this paper is dealing with.[1]

[1] In another paper reforms of the law will be under consideration,—"A Scientific School of Legal Thought." The Green Bag, January, 1905.

So much for right. Duty is only the complement of right in ordinary cases. What this signifies we have already seen; the right of one person ought to be respected by others. A has a right of property or a right by contract; it is B's duty to respect that right, the right is in one person, the duty in another, and the two, the right and the duty, relate to the same thing and to each other. And this is as true of the State as of individuals. The State has rights *in rem* and *in personam*, and individuals owe a corresponding duty to the State to respect those rights; and conversely individuals have rights against the State which the State, except as safety may dictate, is in duty bound to respect.

But there is another aspect of the subject; right and duty may be united in the same person, in the case of the State. This is due to the necessity for remedial law; the State has the right, and it is the duty of the State, to protect its citizens from injustice. It has the right in virtue of its own interest and welfare; it has the duty in virtue of the interest and welfare of its citizens. If however the State has such a right—that is a right the complementary duty whereof is also in the State—so has every citizen a right against the State to call for protection in time of need, and it is therefore the duty of the State to regard that right; so that after all, right and duty are separated in different persons here as in other cases.[1]

Before passing to the third element of law, the relation between right and duty, it is proper to notice that both right and duty are particular; they pertain only to the persons who are concerned with them, the particular person having the right, the particular person owing the duty (though this latter, as we have seen, may be each particular person in the State). It is clear therefore from this point of view, as well as from the considerations heretofore presented, that neither right nor duty alone can be law. Law is general.

We have found it necessary already to say something in regard to the relation between right and duty; in taking

[1] Of course every one has both rights and duties at once, but these are not complementary; they do not relate to the same thing—there is no relation between them.

these terms out of the category of abstract things and fixing them in individuals and in the State, we have seen that the two relate to the same thing and ordinarily are separated between two persons. That makes a necessary relation between right and duty, or what is the same thing, between the persons concerned with the same. A has rights against B; B owes corresponding duties to A. There is a relation of right and duty between the two persons.

Collateral as well as direct relations of right and duty may exist; indeed collateral relations of the kind arise almost inevitably from the direct ones. The illustration already used more than once again serves the purpose. A and B are in relations of contract; those relations are direct. But each of the parties has rights against third persons in virtue of the contract; others may not interrupt the performance of the contract, except as interruption may be the result of acting reasonably upon their own rights. Here the relations are collateral.

But the same relations might exist between half-a-dozen persons cast in shipwreck upon an unknown desert island. The relations between such persons, though naturally legal, could only be voluntary; each might refuse to be bound.[1] In a State however the relations become binding in the very nature of things. It is part of the very life of the State, as we have seen, that complementary relations of right and duty as already described, that is in matters "temporal," should be binding; the State would fall to pieces if it were not so. Relations naturally legal become binding in virtue of the very existence of the State. And so we have law.

The result is, that municipal law, in the sense of requirement, signifies the existence of binding relations, direct and collateral, of right and duty, between men or between the State and men, arising in virtue of freedom to do whatever is reasonable.

What is meant, secondly, by law in the sense of grant of authority? In such cases it must be observed that there is,

[1] The case of voluntary society, such as a debating club, which comes readily to mind, is not a true example, for the relations of the members are not of *legal* right and duty, except in regard to matters, if any, of property or contract. In their very nature the relations (with the exception named) are only moral and of imperfect obligation.

so far as the law itself is concerned, no such relation of right and duty as that just considered. Apart from the duty to conform to the conditions of the grant, which is only a matter of accepting the same, the only duty arising is the collateral one, that others shall not improperly interfere with the acceptance. The law granting the authority is itself only an *offer* of rights; until the offer is accepted there is nothing at all, or nothing but an offer; there can be no relation of right and duty. And even after the offer has been accepted there may be no direct duty, for the right may still be inchoate; something may remain to be done under the right in order to create any relation, other than the collateral one, between the one having the right and third persons, in other words to bring into existence the other factor duty. A town, for instance, has legislative authority to issue bonds for a certain purpose; the town accepts the grant and proceeds to have the bonds executed, but until the bonds are issued, or until some one becomes entitled to require the issuance of them, no duty can arise further than what may have been incidental to preparing the bonds. Laws of this kind are always legislative. Judicial grant of authority is not law; judicial decrees being made *inter partes* only, lack, as we have seen, an essential element of law, generality. Judicial grant of authority is simply authority granted in virtue of power conferred by the State. The power may be conferred by law—authority exercised under the power is another thing; it is only according to law.

A certain phase of judicial law may at first appear to belong to this head. Judicial law permits a man to inflict harm upon another whenever it may reasonably be necessary or may reasonably be supposed to be necessary to do so. One is permitted, for example, to make false accusation of another on certain occasions, as in the reasonable protection of one's rights; judicial law permits a man to bring suit against another upon an unfounded claim, subject only to the payment of costs; and so of other cases. But permission or "privilege" in such cases is not grant of authority. What is more, these are cases of the relation of right and duty, the right being original and not arising from any grant of authority; the person who does the harm

owes to the one who suffers, the duty not to infringe the latter's right to exemption from needless disturbance. Such cases therefore belong to the law of requirement. And this is true though the permission itself is not a right in the sense that it can be made the ground of an action, or the subject of a complementary duty—the person against whom the permission exists owing no duty to the other arising from the permission. The person owing duty is the person having permission ; but that is enough to determine the place of permission.

Indeed judicial law always appears to be founded upon existing rights and permissions, as distinguished from rights and permissions arising under grant of authority, and so always to involve relations of right and duty, the subject of Blackstone's definition. Legislative law may of course be, and usually is, of the same nature.

Law in the form of grant of authority therefore signifies legislative authority, under which binding relations, direct and collateral, of right and duty, may be created, in virtue of the freedom of the State to carry on reasonable purposes in reasonable ways.

It remains to unite the two branches of the definition. This might be done perhaps by seeking out and applying some common term which would include both ; but the result would be apt to be a loss of distinctness and so of practical usefulness in the definition. It is not worth while to work out a definition for the mere sake of it. A definition should in a few words give information of the properties of the thing defined, and so be helpful to those who may have occasion to turn to it. No attempt then will be made to find a common denominator; the two definitions will simply be joined together. Accordingly the following may be put as the general definition :

Municipal law signifies the existence of binding relations, direct and collateral, of right and duty, between men or between the State and men ; or legislative grant of authority under which such relations may be created ; each in virtue of freedom to do whatever is reasonable.

Breach of duty in what may now be called original law gives rise to remedial law, creating, where the breach of duty is between individuals, that is in civil cases, a new

right of compensation, and where the breach of duty is between the State and individuals, that is in criminal cases, a new right, not only in the interest of the State but also in the interest of every member of the State, to have punishment inflicted, subject to pardon. And so there arises a new set of relations requiring a new definition, which may be put as follows:

Remedial law signifies the existence of relations of right and duty between the State and the members of the same, in consequence of a breach of duty, binding the State to enforce compensation in civil and punishment, subject to pardon, in criminal cases.

Procedure, it may be added, signifies the means provided by the State for enforcing the law, original and remedial.

MELVILLE M. BIGELOW.